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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GILBERTO GARIBAY,

Defendant and Appellant.

G039466

(Super. Ct. No. 05HF1808)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard M. King, Judge. Affirmed.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Arlene A. Sevidal, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found Gilberto Garibay guilty of molesting his nieces and nephew while the children lived with him. The trial court sentenced defendant to 61 years to life, consisting of four consecutive sentences, each measuring 15 years to life, and a one-year term for misdemeanor child annoyance. Garibay challenges his conviction, asserting the trial court erred in admitting expert testimony on Child Sexual Abuse Accommodation Syndrome (CSAAS), and in failing to give a limiting instruction on the jury's use of CSAAS evidence. He also contends he was denied a fair trial because the prosecutor disparaged defense counsel in closing argument. Finally, defendant challenges his sentence, contending it is disproportionate to the crimes committed and therefore violates the protections against cruel and unusual punishment in the United States and California Constitutions.

We reject defendant's claim the trial court erred in admitting the CSAAS testimony because defendant failed to contest its admission at trial. Although the trial court did not provide the jury a written copy of a limiting instruction on CSAAS, it did give an oral limiting instruction. Moreover, the CSAAS evidence included extensive testimony explaining it was not a tool for determining the truth of the criminal charges. Accordingly, there was no danger the jury would have been misled into using the CSAAS evidence as proof of defendant's guilt. We also reject defendant's claim he was prejudiced by the prosecutor's statement disparaging defense counsel. The prosecutor made a brief and isolated comment, the trial court sustained defense counsel's objection, and the trial court admonished the jury to disregard the remark.

Finally, we conclude defendant's sentence is not grossly disproportionate to the crimes committed and therefore does not constitute cruel and unusual punishment. Defendant was convicted of 29 counts of sexual misconduct involving four victims. The victims had lost their father shortly before the molestations occurred and defendant, as the children's uncle, abused his position of trust and authority over the children. Accordingly, we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

After their father died, S. (13 yrs. old), L. (12 yrs. old), A. (7 yrs. old), and J. (6 yrs. old), and their mother moved in with their mother's sister and defendant in their Costa Mesa apartment. On multiple occasions, defendant would enter the bathroom after S. finished taking her shower, remove the towel covering her, and touch her vagina. Defendant repeatedly did the same thing with L. Neither S. nor L. reported the touching to anyone while living with defendant.

When J. was seven years old, defendant on one occasion placed her on the bathroom sink, pulled her pants down, and touched her vagina. While defendant was touching J., her mother entered the bathroom to see if J. was ready for her shower. When J.'s mother asked what defendant was doing, he said he was checking for a vaginal infection. J. was sent to her room, where she heard defendant and her mother yelling.

On one occasion before moving in with defendants, A. visited defendant. When preparing to take a shower, defendant entered the bathroom, took A.'s penis in his hand, pulled the foreskin back, and moved his hand back and forth. Defendant repeated this act on A. after A. moved into defendant's apartment.

The children were removed from defendant's apartment and taken to Orangewood Children's Home. The children later were placed in a foster home. While living there, J. informed the mother of one of her foster parents about the incident when defendant touched her. Police detectives interviewed defendant, who claimed he had studied medicine in Mexico, and said he had noticed medical problems such as red spots and marks on the girls' vaginas. He did not deny touching the children, but claimed he did so to teach them how to properly clean their genitals.

At trial, the prosecution played the audiotaped interview for the jury, and each of the children testified. As part of the prosecution's case, Veronica Thomas, Ph.D., a clinical psychologist, testified as an expert on CSAAS. Thomas testified that CSAAS is

a therapy technique aimed to assist therapists in understanding the delayed, discrepant, and reluctant reporting by some children who have been sexually abused by someone they know. Thomas described the five components of CSAAS which include secrecy, helplessness and depression, entrapment and accommodation, disclosure, and recantation. Defendant did not testify.

The jury convicted defendant on 28 counts of lewd act upon a child under 14 (Pen. Code, § 288, subd. (a)),¹ and one count of misdemeanor child annoyance (§ 647.6, subd. (a)). The jury also sustained allegations supporting enhancements for substantial sexual conduct (§ 1203.066, subd. (a)(8)), multiple victims (§ 667.61, subds. (b), (c) & (e)), substantial sexual conduct with a minor under 14 years old (§ 1203.066, subd. (a)(8)), and a lewd act on multiple children (§ 1203.066, subd. (a)(7)). The trial court sentenced defendant to a total term of 61 years in prison, consisting of four consecutive sentences of 15 years to life on four counts of lewd act upon a child, and a consecutive one-year jail term on the count for misdemeanor child annoyance. The court also imposed concurrent 15-year-to-life sentences on the remaining lewd act counts. Defendant now appeals.

II

DISCUSSION

A. *The Trial Court Did Not Commit Reversible Error in Admitting Expert Testimony on CSAAS*

1. Defendant Waived Any Objection to CSAAS Evidence

Defendant contends the trial court erred in admitting any evidence of CSAAS. Defendant argues that California should follow the lead of Pennsylvania, Kentucky, and Tennessee in holding that CSAAS evidence is inadmissible for all purposes. (See, e.g., *Com. v. Dunkle* (1992) 529 Pa. 168), *Newkirk v. Com.* (Ky. 1996)

¹ All statutory references are to the Penal Code unless otherwise indicated.

937 S.W.2d 690; *State v. Bolin* (Tenn. 1996) 922 S.W.2d 870, 873-874.) The Attorney General, however, asserts defendant has forfeited the issue on appeal because he never challenged the admissibility of CSAAS evidence in the trial court. Defendant contends he objected to the evidence therefore preserved the issue for review. We agree with the Attorney General.

During pretrial proceedings, the court noted the prosecution sought admission of CSAAS evidence, but the court declined to rule because defendant had not sought to exclude the evidence. Later during pretrial proceedings, defendant's counsel raised the CSAAS issue as follows: "[DEFENSE COUNSEL]: . . . I do have one area that I would ask to revisit with the court and that is the area with the [CSAAS]. [¶] THE COURT: Are you objecting to that evidence? [¶] [DEFENSE COUNSEL]: Well, here's the way I'd like to articulate my position to the court is that what I am requesting that the court do is reserve the presentation of the evidence after the defense has put on its case-in-chief because I think that the court might be in a different position to evaluate the 350 and 352 aspect of it after the people have presented their case and the defense has presented their case. So it is the defense request that the court defer the introduction of [CSAAS] until rebuttal, until the people's rebuttal. [¶] THE COURT: What authority do I have though that what if it's not rebuttal? I mean, what if it's relevant evidence that the people can offer in their case-in-chief but you decide not to put anybody on? Then aren't they being deprived of what is otherwise relevant evidence? [¶] [DEFENSE COUNSEL]: Yes. [¶] THE COURT: I would see a problem with that. [¶] . . . I don't see how, if it's otherwise relevant and it's not cumulative and it does qualify, I don't see how the court can prevent the People from offering that. [¶] [D]o you have any authority that allows the court, where the People have the burden of proof, to order them to hold back and then the defense — I mean, I just don't know of any authority. [¶] [DEFENSE COUNSEL]: Certainly not."

After denying defendant's request to defer the CSAAS evidence until the prosecution's rebuttal, the following exchange took place: "THE COURT: Are you asking the court to exclude the evidence now? [¶] [DEFENSE COUNSEL]: No. [¶] THE COURT: All right. So then that's not before the court."

At trial, Thomas testified as a prosecution witness and explained the basic aspects of CSAAS. Although defendant objected at various points during Thomas's testimony, defendant never challenged the admissibility of CSAAS evidence in general.

"It is 'the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal.'" (*People v. Raley* (1992) 2 Cal.4th 870, 892.) Defendant provides us no reason why we should depart from the general rule here.

Indeed, departure from the general rule is particularly inappropriate here. More than 20 years ago, in *People v. Bledsoe* (1984) 36 Cal.3d 236, the California Supreme Court acknowledged that expert evidence regarding the behaviors of sexual assault victims "may play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims," by helping juries to "evaluate the evidence free of the constraints of popular myths." (*Id.* at pp. 247-248 [allowing evidence of rape trauma syndrome]; see also *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088 (*Humphrey*) [allowing evidence of battered women's syndrome]; *People v. McAlpin* (1991) 53 Cal.3d 1289, 1300-1301 [allowing evidence regarding parental reluctance to report child molestation].) In *McAlpin*, the Supreme Court cited with approval appellate decisions allowing admission of CSAAS evidence, recognizing it "'is needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children's seemingly self-impeaching behavior. . . .'" (*McAlpin*, at p. 1301.)

By failing to raise this issue below, defendant deprives us of any evidence he might have presented demonstrating that jurors no longer commonly hold misconceptions about child sexual abuse. Absent such evidence, we are constrained to follow our Supreme Court's lead on the matter, however convincing the opinions of other state appellate courts might be. Accordingly, we conclude defendant forfeited any challenge to the general admissibility of CSAAS evidence.

B. *The Trial Court Did Not Commit Reversible Error in Failing to Provide a Limiting Instruction*

CSAAS “evidence is admissible *solely* for the purpose of showing that the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested.” (*People v. Bowker* (1988) 203 Cal.App.3d 385, 394 (*Bowker*).) “[T]he evidence must be targeted to a specific ‘myth’ or ‘misconception’ suggested by the evidence. [Citation.] For instance, where a child delays a significant period of time before reporting an incident or pattern of abuse, an expert could testify that such delayed reporting is not inconsistent with the secretive environment often created by an abuser who occupies a position of trust.” (*Id.* at pp. 393-394.) “Identifying a ‘myth’ or ‘misconception’ has not been interpreted as requiring the prosecution to expressly state on the record the evidence which is inconsistent with the finding of molestation. It is sufficient if the victim's credibility is placed in issue due to the paradoxical behavior, including a delay in reporting molestation.” (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744-1745.) As defendant concedes, this case presents a case of delayed reporting.

But even general testimony on CSAAS “has the potential of being used by an untrained jury as a construct within which to pigeonhole the facts of the case and draw the conclusion that the child must have been molested.” (*People v. Bothuel* (1988) 205 Cal.App.3d 581, 587, disapproved on another point in *People v. Scott* (1994) 9 Cal.4th 331, 348; *Bowker, supra*, 203 Cal.App.3d at p. 394.) As one court noted: “The

frequency with which defendants recently have challenged the alleged misuse of CSAAS evidence suggests this type of testimony may be unusually susceptible of being misunderstood and misapplied by a jury, perhaps because the expert commonly is asked to offer an opinion on whether the victim's behavior was typical of abuse victims, an issue closely related to the ultimate question of whether abuse actually occurred. [Citations.] Such testimony, especially from one recognized as an expert in the field of child abuse, easily could be misconstrued by the jury as corroboration for the victim's claims; where the case boils down to the victim's word against the word of the accused, such evidence could unfairly tip the balance in favor of the prosecution." (*People v. Housley* (1992) 6 Cal.App.4th 947, 958 (*Housley*).) Accordingly, the Supreme Court has recognized that when CSAAS evidence is admitted "[t]he jury should . . . be given a limiting instruction." (*Humphrey, supra*, 13 Cal.4th at p. 1096.)

The requirement of a limiting instruction on CSAAS evidence does not mean reversal is automatic when the instruction is omitted. In *Housley*, the court determined the trial court's failure to provide a limiting instruction was harmless in large part because the expert did not testify regarding the specific facts of the case. The court observed: "Although the court failed to instruct the jury on the limited use of [the expert]'s testimony, this error was clearly harmless and does not require reversal. [The expert] twice told the jury she had not met the victim and had no knowledge of the case. Her testimony was couched in general terms, and described behavior common to abused victims as a class, rather than any individual victim. In the face of this testimony, it is unlikely the jury interpreted her statements as support for [the victim]'s credibility." (*Housley, supra*, 6 Cal.App.4th at p. 959.)

Defendant contends the trial court committed reversible error when it failed to provide the jury a limiting instruction on CSAAS evidence. We disagree.

Here, the trial court orally instructed the jury as to the appropriate use of Thomas's testimony, as follows: "You have heard testimony from Veronica Thomas

regarding [CSAAS]. [¶] Veronica Thomas'[s] testimony about [CSAAS] is not evidence that the defendant committed any of the crimes charged against him. [¶] You may consider this evidence only in deciding whether or not any of the alleged victims in this case'[s] conduct was not inconsistent with the conduct of someone who has been molested and in evaluating the believability of his testimony.” This instruction is essentially the same instruction defendant argues should have been given in the packet of instructions given to the jury.²

Assuming the oral instruction was somehow inadequate, we nonetheless conclude it is unlikely the jury would misconstrue Thomas's testimony as corroboration for the victim's claims because it was so clearly expressed to them they should not. For example, on direct examination the prosecution clarified the scope of Thomas's testimony: “Q. So you're not here today to . . . you're not here to testify whether or not, in your opinion, a molest occurred or did not occur; is that correct? [¶] A. That's right, I am not.” Defendant emphasized this point on cross-examination: “Ma'am, you're not here to render an opinion as to whether or not anything in this case did or didn't happen, are you? [¶] A. No, I'm not.” “Q. You are not here to render any opinion . . . as to whether or not any abuse did occur[,] correct? [¶] A. I am not. [¶] Q. You can't interview a child and make a determination based on these five factors [of CSAAS] that yes, in fact, because of these five factors, this kid was, in fact, actually abused? [¶] A. Right, there is no science that supports that.”

² Defendant asserts the court should have given the following instruction, based on Judicial Council of California Criminal Jury Instructions CALCRIM No. 1193: ““You have heard evidence from Veronica Thomas regarding [CSAAS]. [¶] Thomas's testimony about child accommodation syndrome is not evidence that defendant committed any of the crimes charged against him. [¶] You may consider this evidence only in deciding whether or not S[.], L[.], J[.], and A[.]'s conduct was not inconsistent with someone who has been molested in evaluating the believability of (his/her) testimony.””

Thomas also testified that CSAAS was a therapy technique and that the technique's founder disapproved of its use as a diagnostic test to determine whether a molestation actually had occurred. In explaining she was not rendering an opinion on whether a molestation occurred, Thomas testified she had read nothing about the facts of the present case.

In light of this testimony and the oral instruction given, there is no likelihood the jury was misled into considering Thomas's testimony as evidence the defendant molested the children. Accordingly, we conclude it is not reasonably likely defendant would have received a more favorable verdict had a written limiting instruction been provided to the jury.

C. *The Prosecutor's Statements in Closing Argument Do Not Constitute Prejudicial Misconduct*

During defendant's taped interview with police detectives, he claimed he was a physician, studied medicine in Mexico for many years, and was showing his nieces and nephew how to clean their genital areas. The defense, however argued defendant did not assert he was a doctor on the tape. The defense complained the prosecution's transcript of defendant's interview showing defendant claimed he was a physician was incorrect, due in part to the poor quality of the audiotape. During the prosecutor's closing argument, the following exchange occurred: "[DEPUTY DISTRICT ATTORNEY]: As far as defense counsel's argument that the defendant didn't say he was a doctor, oh yes, he did. I don't care what the transcript says. You all sat here. You listened to him. He was speaking in English. His words are, 'I am a doctor. I'm a physician.' [¶] Okay. One of the — I think the most misleading things that was just stated to you was regarding to get off. [¶] [DEFENSE COUNSEL]: I'm going to object, your Honor. [¶] THE COURT: Yes. Ladies and gentlemen, I'm going to ask you to step outside. Remember the admonition."

Outside the jury's presence, the court admonished the prosecutor against attacks on defendant's counsel. The court believed the word "mislead" carried a sinister connotation. At defendant's request, the court admonished the jury when they returned as follows: "THE COURT: Ladies and gentlemen, the court's going to admonish you that that last comment about mislead you're to disregard. The comment was not said in bad faith. The court is going to once again reiterate that you are to decide this case on the facts that have been presented to you and to follow the law."

Defendant contends the prosecutor's suggestion that defendant's counsel attempted to mislead the jury constituted prejudicial misconduct and requires reversal. We disagree.

A prosecutor's intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so "“egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.” [Citations.] . . . ”” (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214-1215.) Such pervasive misconduct requires reversal unless it is harmless beyond a reasonable doubt. (*People v. Hill* (1998) 17 Cal.4th 800, 844.) As a matter of state law, prosecutorial misconduct involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Espinoza* (1992) 3 Cal.4th 806, 820 (*Espinoza*)). State law misconduct necessitates reversal where it is reasonably probable the prosecutor's intemperate behavior affected the verdict. (*Id.* at p. 821.)

Included within the deceptive or reprehensible methods held to constitute prosecutorial misconduct are personal attacks on the integrity of opposing counsel. (*Espinoza, supra*, 3 Cal.4th at p. 820.) Attacks on defense counsel divert the jury's attention away from the evidence and refocuses their attention on an irrelevant matter. (*People v. Sandoval* (1992) 4 Cal.4th 155, 183.) "Casting uncalled for aspersions on defense counsel directs attention to largely irrelevant matters and does not constitute

comment on the evidence or argument as to inferences to be drawn therefrom.” (*People v. Thompson* (1988) 45 Cal.3d 86, 112.)

We conclude the prosecution’s use of the word “mislead” when referring to defense counsel’s argument does not require reversal. The prosecution’s use of the word was isolated, the trial court sustained defense counsel’s objection, and the trial court admonished the jury to disregard it. Accordingly, it is not reasonably probable the challenged statement affected the verdict. (See *People v. Smithey* (1999) 20 Cal.4th 936, 961 [no prejudice where prosecutor’s improper question “constituted an isolated instance in a lengthy and otherwise well-conducted trial” and was followed by jury admonition].)

D. *The Trial court Did Not Err in Imposing Two 15 Years-to-Life Terms for Counts 1 and 12*

The trial court imposed two 15-year-to-life sentences based on counts 1 and 12, which both involved the same victim, S. Appellant contends the trial court erred in doing so because the jury could have found the offenses occurred in close temporal and spatial proximity. Defendant’s contention is not persuasive.

The Legislature amended section 667.61 to its current version effective September 20, 2006. At the time defendant committed the crimes, section 667.61, subdivision (g), provided, in relevant part: “The term specified in subdivision (a) or (b)³ shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion.” In *People v. Jones* (2001) 25 Cal.4th 98, 100-101 (*Jones*), the California Supreme Court considered the meaning of the phrase “single occasion.” There, the defendant forced a woman into a car and engaged in a series of sexual acts over a period of two hours. The defendant was convicted of forcible rape,

³ The former section 667.61, subdivision (b), provided: “Except as provided in subdivision (a), a person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 15 years except as provided in subdivision (j).”

forcible sodomy, and forcible oral copulation. Determining each of the sexual acts occurred on a single occasion, the trial court sentenced the defendant to three consecutive terms of 25 years to life. The Supreme Court reversed, “conclud[ing] that multiple sex offenses occur[] on a ‘single occasion’ within the meaning of . . . section 667.61, subdivision (g), if there was a close temporal and spatial proximity between offenses.” *Jones*, at pp. 100-101.) Because each of the acts occurred in the same location and during a continuing period of time, the court determined that a single sentence was warranted.

The present situation is easily contrasted with that in *Jones*. Here, evidence admitted at trial demonstrated defendant touched S. “almost daily,” “almost every time she showered.” In imposing a separate sentence on count 12, the trial court ruled: “The court will impose 15 to life to run consecutive. The court does find that from this record, although this is the same victim, there are multiple acts on the victim that [are] separated in time and are separate incidents.” The court’s finding that the incidents with S. were “separated in time” was a rejection of any notion the incidents shared a “close temporal . . . proximity.” Because this finding was supported by the evidence, we conclude the trial court did not err in imposing separate sentences for counts 1 and 12.

E. *Defendant’s 61-Year-To-Life Sentence Does Not Constitute Cruel and Unusual Punishment Under Either Federal or State Law*

Noting he will not be eligible for parole for 61 years, defendant, now 45 years old, contends his sentence is effectively a life sentence without the possibility of parole, and therefore constitutes cruel and unusual punishment under the United States and the California Constitutions. We disagree.

The Eighth Amendment to the United States Constitution prohibits only “‘grossly disproportionate’” sentences. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001.) There is no requirement of strict proportionality between the crime and sentence

and successful proportionality challenges are ““exceedingly rare”” because courts lack “clear” objective standards to distinguish different prison sentences. (*Ibid.*) In *Ewing v. California* (2003) 538 U.S. 11, 28, the court concluded the defendant’s sentence of 25 years to life for commercial burglary under California’s Three Strikes law was not grossly disproportionate to the offense and therefore did not violate the Eighth Amendment’s prohibition against cruel and unusual punishment. (*Ewing*, at p. 28; see also *Lockyer v. Andrade* (2003) 538 U.S. 63.) Justice O’Connor, in her plurality opinion announcing the judgment of the court, held the defendant’s sentence was “justified by the State’s public-safety interest in incapacitating and deterring recidivist felons, and amply supported by [the defendant’s] own long, serious criminal record.” (*Ewing*, at pp. 29-30.)

California’s constitutional proscription against cruel or unusual punishment is found in article I, section 17 of the California Constitution. The test under the state Constitution is whether the punishment is “so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” (*In re Lynch* (1972) 8 Cal.3d 410, 424.) The defendant must demonstrate the punishment is disproportionate in light of (1) the offense and defendant’s background, (2) more serious offenses, or (3) similar offenses in other jurisdictions. (*Id.* at pp. 429-437.) The defendant must overcome a “considerable burden” to show the sentence is disproportionate to her level of culpability. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.) As a result, “[f]indings of disproportionality have occurred with exquisite rarity in the case law.” (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196.)

Defendant was convicted of 28 counts of lewd acts upon a child under the age of 14. His crimes occurred over the course of a two-year period and involved multiple victims. The crimes occurred almost daily. Defendant, as the children’s uncle, occupied a position of trust with each of the victims. At the time the molestations commenced, the children had just lost their father, and were especially vulnerable. Defendant took advantage of that position to gratify his own sexual desires. The victims

did not consent to defendant's actions; some requested him to stop. Moreover, defendant's criminal record includes convictions for spousal abuse, public drunkenness, and resisting arrest. In sum, nothing in the nature of the crimes or defendant's background suggests he received grossly disproportionate punishment.

To demonstrate disproportionality, defendant notes that someone who commits a cold-blooded premeditated murder with a firearm, but without special circumstances, would receive a maximum sentence of 50 years to life, and would be eligible for parole in 50 years, 11 years less than defendant. As defendant notes, he cannot reasonably serve his sentence during his lifetime. But convictions for multiple sexual offenses exceeding a defendant's expected lifetime repeatedly passed constitutional muster. (See, e.g., *People v. Wallace* (1993) 14 Cal.App.4th 651, 666 [283 year sentence for 46 sex crimes against seven victims]; *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 532 [129 years for 25 sex crimes against one victim].) Accordingly, we conclude defendant's sentence does not constitute cruel or unusual punishment under either the United States or California Constitutions.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.